NO. 43073-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GEOVANI TRUJILLO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable KATHERINE M. STOLZ

No. 10-1-02295-5

Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should the court review the finding regarding defendant's ability to pay when pursuant to case law, a specific finding on a defendant's ability to pay is not required before collection, the majority of the legal financial obligations imposed were mandatory, and defendant is capable of finding a job?

2. Did the court properly impose community custody conditions prohibiting internet access and ordering a substance abuse evaluation?

3. Should the court remand to correct the scrivener's error?

B. STATEMENT OF THE CASE.

1. Procedure

On May 27, 2010, the Pierce County Prosecuting Attorney's Office charged Geovani Trujillo, defendant, with six counts of child molestation in the second degree. CP 1-4. To add another victim, charges were amended to four counts of child molestation in the second degree on October 3, 2011. CP 10-12. On that same day, defendant entered a guilty plea to the amended charges. CP 12.

The court sentenced defendant on January 25, 2011. RP 11. The court rejected the State and defendant's recommendations for Special Sex

Offender Sentencing Alternative (SSOSA) because defendant violated a no-contact order while out on bail. RP 23. The court imposed a mid-range sentence of 105 months, plus 36 months of community custody, as well as mandatory fees and costs. CP 39, 55. The court also imposed crime-related conditions of release, including no-contact with minor children, no access to the internet, and alcohol and drug assessment. [1]

On February 21, 2012, defendant timely filed a Notice of Appeal. CP 63-80.

2. Facts

During the period between June 1, 2009, and May 31, 2010, defendant repeatedly had sexual contact with S.A.G, L.R.W, and A.M.L CP 5-6. Defendant admitted to sexually molesting the victims, who were all between the ages of 12 and 14 years old, when they came over for sleepovers at L.R.W's home. *Id.* Defendant was the live-in boyfriend of L.R.W's mother, and S.A.G and A.M.L. came to L.R.W's home for sleepovers as frequently as every other weekend in the summer. *Id.*

[1] The court imposed the mandatory $500 crime victim penalty assessment, $100 DNA, and $200 criminal filing fees. CP 40. The only cost imposed by the discretion of the court was a $400 DAC recoupment fee. CP 40.

C. ARGUMENT.

1. SINCE THE FINDING CONCERNING THE DEFENDANT'S ABILITY TO PAY HAS NO IMPACT ON DEFEDANT'S RIGHTS, IT NEED NOT BE REVIEWED.

a. By statute, the victim penalty assessment, crime lab fee, and biological sample fee may be collected without any finding concerning defendant's ability to pay.

Pursuant to statutory authority, the court may impose legal financial obligations as part of a convicted defendant's sentence. RCW 9.94A.760. "[D]ifferent components of the financial obligations imposed on a defendant, such as attorney fees, court costs, and victim penalty assessments, require separate analysis." ***State v. Baldwin***, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991). In other words, it is necessary to examine the specific statutory provisions governing the financial obligations imposed in the present case.

Under RCW 7.68.035(1)(a), a $500 victim penalty assessment must be imposed on every defendant who is convicted of a felony. The statute does not contain any exception for indigent defendants.

Under RCW 43.43.754(1), a $100 biological sample fee must be included in every sentence for a crime for which a biological sample must be collected. This includes every case in which a person is convicted of a

felony. RCW 43.43.754(1)(a). Again, there is no exception for indigent defendants. A $100 crime lab fee is required when a person has been convicted of a crime and an analysis was performed by a state crime laboratory. "Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee." RCW 43.43.690(1).

Under RCW 36.18.020(h), a $200 criminal filing fee must be imposed on every defendant who is convicted or enters a plea of guilty.

Once these obligations have been imposed, collection is governed by RCW 9.94A.760. The sentencing court should "set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligations." RCW 9.94A.760(1). The Department of Corrections (DOC) is authorized to collect these amounts during the period of supervision. RCW 9.94A.760(8). "[T]he department may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances." To determine the appropriateness of the payment schedule, DOC may require the defendant to provide information under oath concerning his assets and earning capabilities. RCW 9.94A.760(7)(a).

These statutes do not require a showing of ability to pay before the court may collect legal financial obligations. Rather, RCW 9.94A.760(8) authorizes DOC to collect the monthly payment amount set by the court. This does not mean that the defendant's ability to pay is irrelevant. Rather,

his financial situation may be a basis for modifying the monthly amount. RCW 9.94A.760(7)(a).

In the instant case, defendant challenges, for the first time on appeal, the trial court's finding that he has the present or future ability to pay his legal financial obligations. Brief of Appellant at 4-5. Specifically, defendant claims that "before the State can collect LFOs, there must be a properly supported, individualized judicial determination that Trujillo has the ability to pay." *Id.* at 5. Defendant's argument incorrectly treats the "legal financial obligations" as a homogeneous category. Different components of legal financial obligations must be analyzed separately. ***State v. Baldwin***, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991). In light of the statutory provisions governing the financial obligations imposed, the majority of legal financial obligations imposed on defendant were mandatory. The imposition of the $100 crime lab fee is mandatory because defendant made no petition to have it waived, and the $200 criminal filing and $500 victim penalty assessment fees are also mandatory. In sum, $800 of the $1,200 in legal financial obligations imposed is mandatory and requires no showing of defendant's ability to pay before the court may collect legal financial obligations.

b. Under case law, the statutory provisions are constitutionally sufficient.

In arguing that a finding of ability to pay is required before collection, the defendant relies on Division Two's decision in ***State v. Bertrand***, 165 Wn. App. 393, 267 P.3d 511 (2011). That decision must be examined in light of the prior cases on which it was based: (1) the Supreme Court's decision in ***State v. Curry,*** 118 Wn.2d 911, 829 P.2d 166 (1992), and (2) this Court's decision in ***Baldwin***.

In ***Curry***, the Supreme Court differentiated between two different kinds of legal financial obligations: court costs and the victim penalty assessment. Court costs are governed by RCW 10.01.160. That statute precludes imposition of costs "unless the defendant is or will be able to pay them." RCW 10.01.160(3). The statute further provides for remission of costs or modification of the method of payment on a showing that payment would impose manifest hardship on the defendant or his immediate family. RCW 10.01.160(4).

The Supreme Court held that these statutory provisions satisfied constitutional requirements. The court rejected any requirement for specific findings regarding a defendant's ability to pay.

> According to the statute, the imposition of fines is within the trial court's discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a

> defendant who is ultimately unable to pay to have his or her sentence modified. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.

Curry, 118 Wn.2d at 916.

Curry went on to consider the validity of victim penalty assessments. Unlike RCW 10.01.160, the statute on victim assessments does not contain any provision for consideration of indigency. The court nonetheless held that the statute was constitutionally valid:

> [T]here are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants. Under [former] RCW 9.94A.200, a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. . .Thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

Curry, 118 Wn.2d at 918 (citations omitted).

Under ***Curry***, neither the imposition nor the collection of the victim penalty assessment depends on a prior showing of ability to pay. Rather, the proper time for consideration of indigency is at a sanctions hearing. If the lack of payment is not willful, sanctions may not include incarceration. The statutes governing the biological sample and crime lab fees are substantially identical to that governing the victim assessment, so the same reasoning should apply to those fees as well.

In ***Baldwin***, this Court applied the holding of ***Curry***. The trial court had imposed $85 in court costs and $500 for recoupment of attorney fees. With regard to the $85 in court costs, this Court held that ***Curry*** was dispositive as to their validity. ***Baldwin***, 63 Wn. App. at 308-09. The $500 attorney fee assessment, however, implicated the defendant's constitutional right to counsel. Further analysis was therefore necessary. *Id.* at 309.

This Court nonetheless held that the assessment was valid without a specific finding of ability to pay. Under RCW 10.01.160, the court was required to consider the defendant's financial resources. The record showed that the court had done so. The pre-sentence report indicated that the defendant was employable. Consequently, the imposition of the $500 assessment was not an abuse of discretion. ***Baldwin***, 63 Wn. App. at 311-12.

In ***Bertrand***, this Court applied the holding from ***Baldwin***, but the analysis is scant. The trial court in ***Bertrand*** imposed $4,304 in "legal financial obligations." The opinion does not specify the nature of these "obligations." The record indicated that the defendant was disabled. There was apparently no other information in the record concerning the defendant's ability to pay. ***Bertrand***, 165 Wn. App. at 398 7.

This Court analyzed this situation as follows:

> Although ***Baldwin*** does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for us to review whether "the

> trial court judge took into account the financial resources of the defendant and the nature of the burden" imposed by LFOs under the clearly erroneous standard. ***Baldwin***, 63 Wn. App. at 312... The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, the record before us on appeal contains no evidence to support the trial court's finding ... that [the defendant] has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding ... was clearly erroneous.

Bertrand, 165 Wn. App. at 617.

In following this analysis, this Court appears to have applied ***Bertrand*** out of context. The quoted language from ***Baldwin*** is based on RCW 10.01.160, which governs imposition of court costs. ***Baldwin*** applied this requirement to attorney fees as well. *Id.* at 310. In ***Bertrand***, however, the court applied this analysis to "legal financial obligations," without specifying their nature.

If the obligations at issue consisted solely of court costs and attorney fees, the court was correct. RCW 10.01.160(4) requires a trial court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." If, however, the holding of ***Bertrand*** is extended beyond this context, it is wrong. Statutes involving other kinds of legal financial obligations do not usually contain similar requirements. In particular, there is no such requirement in the statutes governing or biological samples. The statute governing crime lab

fees does contain a reference to ability to pay, but the defendant must affirmatively demonstrate his indigence.

After the ***Bertrand*** court overturned the finding concerning ability to pay, it went on to consider the appropriate remedy. It cited the following language from ***Baldwin***:

> [T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation. . . The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship.] Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his *present* ability to pay at the relevant time.

Bertrand, 165 Wn. App. at 405, quoting ***Baldwin***, 63 Wn. App. at 310-11 (***Bertrand*** court's emphasis). Based on this language, the ***Bertrand*** court concluded:

> Although the trial court ordered [the defendant] to begin paying her LFOs within 60 days of the judgment and sentence, our reversal of the trial court's judgment and sentence finding [of ability to pay] forecloses the ability of the Department of Corrections to begin collecting LFOs from Bertrand until after a future determination of her ability to pay. Thus, because Bertrand can apply for remission of her LFOs when the State initiates collections, we do not further address her LFO challenge.

Bertrand, 165 Wn. App. 393 at 405.

This conclusion again mis-states the analysis of ***Baldwin***. That case discussed two ways in which a defendant's ability to pay is considered at the time of collection. First, the defendant cannot be incarcerated for non-willful failure to pay. Second, the defendant may

petition for a remission of costs. ***Baldwin***, 63 Wn. App. at 310-11; *see* ***Curry***, 118 Wn.2d at 917-18 (discussing safeguards for indigent defendants who fail to pay crime victim assessments).

Both of these remedies, however, require an affirmative showing by the defendant. At a violation hearing, the defendant bears the burden of showing that his failure to pay was not willful. ***State v. Woodward***, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). Similarly, a petition for remission of costs should be granted only on an affirmative showing of manifest hardship. RCW 10.01.160. Thus, contrary to what ***Bertrand*** says, nothing in ***Baldwin*** requires an affirmative showing of ability to pay before financial obligations can be collected.

Any such holding would essentially negate the Supreme Court's analysis in ***Curry***. There, the court held that both court costs and the victim penalty assessment could be imposed without any specific finding of the defendant's ability to pay. ***Curry***, 118 Wn.2d at 916-17. Under ***Bertrand***, however, the obligations cannot be collected without such a finding. No purpose is served by imposing legal financial obligations if nothing can be done to collect them.

In sum, the trial court's finding concerning ability to pay is, in the context of this case, of no legal significance. That finding has no impact on either the court's ability to impose the obligations or the Clerk's ability to collect them. If the defendant is unable to pay his legal financial obligations after he is released, he can seek modification of the payment

schedule. His ability to do so is not affected by the finding in the judgment and sentence. Since the finding has no effect, no purpose would be served by striking it.

c. If this Court reviews the finding, it is supported by evidence that the defendant is capable of holding a job.

Even if the finding of ability to pay is open to challenge, it is adequately supported by the record. The record in this case states that defendant is 28 years old, and is a high school graduate with post-secondary education. RP 4. In addition, defendant's pre-sentence report states that defendant was employed at Movie Gallery in Puyallup and Pilot Truck Stop in Ellensburg and receives $3000 per month from a lawsuit. CP 82-106.

In ***Baldwin***, the pre-sentence report described the defendant as "employable." This information "establish[ed] a factual basis for the defendant's future ability to pay." ***Baldwin***, 63 Wn. App. at 311. Similarly in the present case, information that the defendant has job skills supports an inference that he has the ability to pay his legal financial obligations after release.

In contrast, the record in ***Bertrand*** contained no information about the defendant's ability to pay. To the contrary, it showed that the defendant was disabled, putting her future ability to pay in serious doubt.

Bertrand, 165 Wn. App. at 404 FN15. These problems do not exist in the present case.

Defendant utterly fails to articulate why he is unable to pay his financial obligations. Considering the record as a whole, the trial court's finding of ability to pay is not clearly erroneous.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DEFENDANT TO OBTAIN A SUBSTANCE ABUSE EVALUATION, BUT IT ABUSED ITS DISCRETION WHEN IT IMPOSED A CONDITION PROHIBITING ACCESS TO THE INTERNET.

When sentencing a defendant to community custody, RCW 9.94A.703 provides guidance for what restrictions the court may include as part of community custody. Elements mandatory for the court to include in the order of community custody appear in RCW 9.94A.703(1). RCW 9.94A.703(2) lists conditions that the court may choose to waive but shall otherwise impose. Further discretionary elements appear in RCW 9.94A.703(3).

The authority for the court to sentence a convicted person to community custody comes from RCW 9.94A.703. Amongst the mandatory conditions, the court will "[r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704." RCW 9.94A.703(1)(b).

The Department of Corrections "may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws." RCW 9.94A.704(4). The court "shall order an offender" to act in accordance with the conditions of RCW 9.94A.703(2) unless the court chooses to waive them. "As part of any term of community custody, the court may order an offender to: ... (c) Participate in crime-related treatment or counseling; (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]" RCW 9.94A.703(3). RCW 9.94A.704(4) grants the department the authority to make an offender participate in a rehabilitative program. Specifically, "[t]he department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws." RCW 9.94A.704(4). Although RCW 9.94A.030 does not define "rehabilitative program," this Court has previously considered substance abuse programs as viable rehabilitative programs. *See* ***State v. Motter***, 139 Wn. App. 797, 162 P.3d 1190 (2007).

The court ordered conditions must address an issue that contributed to the offense. ***State v. Jones***, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003). However, no causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. ***State v. Llamas-Villa***, 67 Wn.

App. 448, 456, 836 P.2d 239 (1992). The trial court may also rely on information that is "admitted" or "acknowledged" "at the time of sentencing" in imposing a sentence. RCW 9.94A.530(2).

When a court imposes a sentence that falls outside of its statutory authority, defendant can raise the issue for the first time on appeal. ***State v. Jones***, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (citing ***State v. Julian,*** 102 Wn. App. 296, 304, 9 P.3d 831 (2000)). The Washington Supreme Court has generally reviewed matters of sentencing conditions for abuse of discretion. ***In re Rainey***, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

In the instant case, defendant challenges two conditions of his community custody. Brief of Appellant at 8-10.

The State concedes that the condition that prohibits defendant's use of the internet is not crime-related. The State agrees that this case should be remanded to correct the judgment and sentence as to that condition only.

Defendant also challenges the provision in Appendix H that directs defendant to obtain a substance abuse evaluation and follow-up treatment. Contrary to defendant's claim, the pre-sentence report clearly shows that defendant used marijuana, crack cocaine, methamphetamine, "shrooms," and pills. CP 82-106. Further, defendant stated in the pre-sentence report that he drank and smoked "weed" quite a bit, at the time of the offense. CP 82-106. Evaluation and treatment for defendant's substance abuse problem is conduct reasonably related to defendant's risk of reoffending and the

safety of the community. The trial court did not abuse its discretion in ordering such a provision.

This case should be remanded for resentencing only to remove the community custody condition prohibiting defendant's use of the internet. As the pre-sentence report clearly shows that defendant consumed drugs and alcohol at the time of the offense and used various drugs in the past, the State respectfully requests that this Court affirm defendant's conviction, including the substance abuse treatment condition.

3. AS THE JUDGMENT AND SENTENCE DOES NOT CORRECTLY REFLECT THE COURT'S REASONS FOR IMPOSING COMMUNITY CUSTODY CONDITIONS, THIS COURT SHOULD REMAND TO CORRECT THE SCRIVENER'S ERROR.

A written judgment is the final judgment in a case. *See* generally, ***State v. Davis***, 125 Wn. App. 59, 64-65, 104 P.3d 11 (2004). Scrivener's errors are clerical errors that are the result of mistake or inadvertence, especially in writing or copying something on the record. They are not errors of judicial reasoning or determination. *See* BLACK'S LAW DICTIONARY 582, 1375 (8th ed. 1999). Clerical mistakes, in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the trial court at any time of its own initiative. CrR 7.8(a), *see* ***State v. Davis,*** 160 Wn. App. 471, 478, 248 P.3d 121 (2011). Clerical mistakes may also be corrected before review is

accepted by an appellate court, and once accepted for review by an appellate court may be corrected pursuant to RAP 7.2(e). *Id.* at 478. A clerical error is one that, when amended, would correctly convey the intention of the court based on other evidence. ***State v. Davis***, 160 Wn. App 471, 478, 248 P.3d 121 (2011).

Courts will apply the same test used to determine a clerical error under CR 60(a), civil rule governing amendment of judgments when determining whether a clerical error exists under CrR 7.8. ***State v. Snapp***, 119 Wn. App 614, 627, 82 P.3d 252 (2004). In determining whether an error is clerical or judicial, the court will "look to whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." *Id.,* citing ***Presidential Estates Apartment Assocs. v. Barret***, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). If the judgment does embody the court's intention, then the amended judgment should either correct the language to reflect the court's intention or add the language the court inadvertently omitted. ***Snapp***, 119 Wn. App at 627, citing ***Presidential***, 129 Wn.2d at 326. However, if the judgment does not, then the error is judicial and the court cannot amend the judgment and sentence. ***Snapp***, 119 Wn. App at 627, citing ***Presidential***, 129 Wn.2d at 326.

In the instant case, defendant claims there is a scrivener's error in the Judgment and Sentence because it states that defendant was sentenced to community custody conditions for committing a serious violent offense.

Brief of Appellant at 11-12; CP 42. The State agrees that this is an error because defendant was convicted of second degree child molestation, which is not a serious violent offense as defined by the Legislature. RCW 9.94A.030(45).

Because the court will remand for resentencing to remove the community custody condition prohibiting internet use, the trial court can correct the scrivener's error at the same time. This does not change the substance of defendant's sentence.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm defendant's convictions below. The State also asks this Court to remand for resentencing to strike the community custody condition prohibiting defendant's internet access and to correct the scrivener's error.

DATED: August 29, 2012.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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